

FREE SPEECH IS NOT CHEAP: PROTECTING MANDATORY STUDENT ACTIVITY FEES POST- *JANUS*

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ABSTRACT

College campuses play a unique role in democracies in the way they foster the growth of new ideas, while simultaneously debunking the false merit of beliefs that are outdated and erroneous. Central to this important mission of college campuses is a robust First Amendment, strong protections for the free-flow of ideas, and a tolerance by the majority for the minority's right to espouse its countervailing beliefs.

The debate over the necessary protections for free speech on college campuses has many components. Some of the most well-known features of this debate involve the imposition of free speech zones, student-led shutdowns of guest speakers, and the refusal of schools to provide adequate security funding for controversial debates. One overlooked aspect of this issue, however, involves the practice of public colleges to charge students mandatory activity fees to subsidize student organizations that support a variety of political and ideological causes some students find repugnant. Disgruntled students have turned to litigation to fight this form of state-compelled speech but received unfavorable treatment from the Supreme Court.

During the summer of 2018, however, the Supreme Court garnered attention after announcing its holding in *Janus v. AFSCME*. Public unions, the Court declared, cannot under the First Amendment charge fees to nonmembers to subsidize the unions' representation and collective bargaining activities. Following this decision, campus reformers have shown optimism that they now have the necessary momentum to finally convince the Court to declare mandatory activity fees unconstitutional. Such a legal battle, however, would be unwise and counterintuitive to the goal of increasing the free flow of ideas on campus given the benefits and protections of the legal framework that currently governs mandatory activity fees. Campus reformers therefore should focus their legal resources elsewhere to improve free speech on campus.

INTRODUCTION

Less than three months after the Supreme Court announced in *Janus v. AFSCME* that the First Amendment prohibits public unions from charging nonmembers agency fees, campus reformers began questioning whether a new avenue to speech reform on campus had opened.¹ Public colleges customarily engage in the practice of charging all students

1. See Fred Lucas, *Supreme Court Decisions Could Curb Campus Censorship*, Fox News (Aug. 24, 2018), <https://www.foxnews.com/politics/supreme-court-decisions-could-curb-campus-censorship>.

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mandatory activity fees to subsidize student organizations.² Some of these student organizations, however, support political, ideological, and social causes that some students find deeply offensive.³ Earlier efforts to challenge this forced-subsidization of speech resulted in unfavorable treatment by the Supreme Court in *Board of Regents of University of Wisconsin System v. Southworth*.⁴ The broad language in *Janus*, however, reveals the Supreme Court's newfound willingness to overturn precedent in the name of a robust First Amendment, leading campus reformers to believe that the time has arrived to stage a second attack against activity fees.⁵

This note argues that such an endeavor would be a waste of legal resources and energy and would likely lead to the undesirable result of stifling rather than enhancing the free flow of ideas on campus. The legal framework that once governed union fees pre-*Janus* differs significantly from the legal framework governing mandatory activity fees, with the former suffering from serious implementation issues and the latter providing more robust speech protections compatible with an educational context.⁶ Consequently, this Note advises courts to refrain from extending *Janus* to the context of mandatory activity fees and instructs campus reformers to focus their legal resources and energy elsewhere. Part I of this Note provides a comprehensive background of the role that robust free speech protections play in democratic and progressive societies, as well as explaining the current impediments to the free flow of ideas on American college campuses. Part II addresses the Supreme Court's jurisprudence surrounding state-subsidization of speech in the context of union fees, state bar fees, and mandatory activity fees, and explains the legal landscape following *Janus*. Part III then discusses the lack of necessity for, and negative consequences of, extending that decision to mandatory activity fees.

2. *Id.*

3. *See id.*

4. *See* 529 U.S. 217, 221 (2000) (“The First Amendment permits a public university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech if the program is viewpoint neutral.”).

5. *See* Lucas, *supra* note 1; William Baude & Eugene Volokh, Comment, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 199–200 (2018).

6. *See* discussion *infra* Part II.

I. THE IMPORTANCE OF FREE SPEECH IN DEMOCRATIC SOCIETIES

A. *A Brief Overview of the Freedom of Expression According to Western Thought*

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”⁷ This portion of the Constitution embodies the nearly-universal commitment to the freedom of expression in modern democracies with its roots firmly established in western political thought.⁸ While a complete description of the reasons for a robust commitment to the free flow of ideas is beyond the scope of this note, a brief overview of a few of the most compelling justifications for protecting the freedom of expression is necessary to provide an appropriate background to this fundamental right and the role it plays in democratic societies.

First, the freedom of expression is an important ingredient for the development of a progressive society. This is most obvious from the fact that it enables individuals to seek truth and expose and refute falsehoods.⁹ “But the peculiar evil of silencing the expression of an opinion,” wrote John Stuart Mill, “is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion, still more than those who hold it.”¹⁰ Many meritorious arguments support the notion that the law should limit certain forms of expression, such as speech that stirs and promotes violent hatred for others.¹¹ Mill’s observation on the importance of free expression in the forward development of civilization, however, underscores a common mistake made by individuals who wish to restrict speech.¹² Rather than further the sometimes-noble purposes for which the advocates of speech restriction hope to achieve by suppressing certain ideas, such speech restrictions produce the undesirable result of outdated, erroneous, and ignorant prejudices remaining entrenched in the minds of the public.¹³

7. U.S. CONST. amend. I.

8. See Ankita Sharma & Hiral Mukhopadhyay, *Emerging Horizons of Free Speech*, 45 LAW TECH. 28, 28–29 (2012).

9. See TIMOTHY GARTON ASH, *FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD* 152 (2016).

10. JOHN STUART MILL, *ON LIBERTY* 77 (Michael B. Mathias ed. 2007).

11. See ERWIN CHERMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 23 (2017).

12. See MILL, *supra* note 10, at 77.

13. See ASH, *supra* note 9, at 152–54 (discussing how the lack of free expression historically has hindered the development of scientific knowledge and allowed erroneous beliefs to prevail).

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The unfortunate outcome of outdated ideas continuing to exist and linger stems from the fact that they remain unaddressed, since there lacks reason to articulate and develop arguments against ideas and thoughts that the law forbids individuals to express.¹⁴ As such, the outdated, erroneous, and perhaps prejudicial thoughts and beliefs continue to exist outside the public sphere in the private minds of individuals.¹⁵ Mill describes this situation best when he states that “[i]f the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.”¹⁶ By prohibiting speech restrictions and allowing individuals to espouse unpopular beliefs in the public sphere, the opportunity exists to refute false beliefs through argument and debate, thereby further bolstering the legitimacy and correctness of popular belief.¹⁷

Aside from Mill’s articulation of the importance of free thought in creating a progressive society, the freedom of expression plays an equally integral role in the maintenance of democratic forms of government.¹⁸ Democracies only provide the framework for a free and self-governing society insofar as the people have means of acquiring and dispensing information relevant to public affairs.¹⁹ For “[i]t is not the act of voting that creates a self-governing society but rather the people’s ability to formulate and communicate their opinions about what decisions or policies will best advance the community’s welfare.”²⁰ In essence, a vote is useless to the maintenance of a true democracy in which the people govern unless the individuals casting their votes are well-informed and free to learn of matters affecting society.²¹

Further, the ability to freely criticize and question the actions of those with governing authority provides a protection against the rise of anti-democratic authoritarian regimes.²² By spreading information about the conduct of officeholders, the people can hold their politicians accountable as is required for proper self-governance.²³ Prior to gaining control of and destroying the constitutional democracy that existed in

14. *See id.*

15. *See id.*

16. MILL, *supra* note 10, at 77.

17. *See id.*

18. *See* CHEMERINSKY & GILLMAN, *supra* note 11, at 25.

19. *Id.*

20. *Id.*

21. *See id.*

22. *See id.* at 26.

23. *See* CHEMERINSKY & GILLMAN, *supra* note 11, at 25.

Germany during the 1920s, the Nazis advanced a political platform known as the “Twenty-Five Points.”²⁴ The most comprehensive point unsurprisingly involved the press.²⁵ It prohibited “non-Germans” from playing any role in the writing or dissemination of newspapers, which essentially translated into a prohibition against the publication of any dissent against the Nazis.²⁶ A strong commitment to free speech, in other words, provides a safeguard against authoritarian manipulation and state propaganda.²⁷

B. The Role of Universities in Challenging Outdated Thought: The 1960s and Unrest on College Campuses

The importance of the freedom of expression for the maintenance of progressive and democratic societies is particularly relevant on college campuses, both public and private.²⁸ College campuses are not merely institutions that individuals attend to engage in “professional inquiry and discovery,” but also where they participate in the “noncivilized and nonscholarly expression of ideas.”²⁹ College campuses pride themselves on fostering an atmosphere where individuals can freely challenge prevailing norms and assumptions while also addressing edgy and uncomfortable topics.³⁰ Consequently, it is in this environment where thoughts and concepts are “subjected to debate and assessment” and where truth and human progress will be found.³¹

This broad understanding of the role of college campuses in free and progressive societies is relatively new, however, and largely stems from the 1960s and the Berkeley Free Speech Movement.³² This movement involved protests staged by students at the University of California, Berkeley, against the college administration in the name of improving their speech rights on campus.³³ The school maintained a policy of prohibiting students from using campus property to engage in certain

24. See BENJAMIN CARTER HETT, *THE DEATH OF DEMOCRACY: HITLER’S RISE TO POWER AND THE DOWNFALL OF THE WEIMAR REPUBLIC* 98 (2018).

25. See *id.* at 100.

26. See *id.* at 100–01.

27. Hitler’s restrictions on free speech, including prohibiting the appearance of non-German newspapers without express approval of the government, empowered authoritarian governance by the Nazis. *Id.*

28. CHEMERINSKY & GILLMAN, *supra* note 11, at 53.

29. *Id.* at 74–75.

30. ASH, *supra* note 9, at 155.

31. See CHEMERINSKY & GILLMAN, *supra* note 11, at 65.

32. *Id.* at 74–75.

33. *Id.* at 75.

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political speech.³⁴ This limitation on students' ability to engage in debate and to freely express themselves resulted in extensive student protests for the school to reform its speech policy to reflect constitutional standards under the First Amendment.³⁵ The students reconceptualized the idea of campus from a setting where individuals exclusively went for professional training to a location where the public could freely engage in debate.³⁶ This reconceptualization eventually spread beyond Berkeley to colleges throughout the United States, which firmly established the idea that campuses should serve as fertile grounds for political activism.³⁷

C. Current Impediments to the Freedom of Expression on College Campuses

While students of the 1960s led the revolt against speech restrictions imposed by college administrators, which eventually culminated in American universities acting as forums where students could freely express their ideas and challenge those of others, college students today are seeking the reversal of the values their predecessors labored to protect.³⁸ Rather than calling for college administrators to open the gates to the free exchange of ideas, students instead press campus leaders to suppress speech and forms of expression they disfavor.³⁹ These calls for speech suppression largely stem from legitimate concerns over speech that mocks, demeans, or fosters hatred for historically underrepresented groups in the United States.⁴⁰

Beneath the surface of these concerns, however, lies an attitude at odds with the commitment to free speech held by the student activists of the 1960s.⁴¹ A 2018 survey, for instance, found that thirty-seven percent of college students deemed it permissible to silence a speaker through shouting, while ten percent stated that violence is a legitimate means to

34. *Id.*

35. *See id.*

36. CHEMERINSKY & GILLMAN, *supra* note 11, at 75.

37. *See id.* at 76.

38. *See id.* at 13.

39. *Id.*

40. *See id.* at 1–7 (listing various events that occurred on college campuses in 2015 that implicated free speech concerns).

41. *See generally* Jeffrey J. Selingo, *College Students Support Free Speech—Unless it Offends Them*, WASH. POST (Mar. 12, 2018, 12:01 AM), https://www.washingtonpost.com/local/college-students-support-free-speech—unless-it-offends-them/2018/03/09/79f21c9e-23e4-11e8-94da-cbf9d112159c_story.html?noredirect=on&utm_term=.39b554a04730 (discussing how college students today fail to appreciate the importance of robust protections for free speech).

preventing people from espousing certain ideas.⁴² While these two groups represent a minority of college students, the study discovered that college students are “likely to support policies that place limits on speech.”⁴³ Significantly, the statistics in the 2018 survey show a decrease over the past few years in student appreciation for divergent viewpoints.⁴⁴

These attitudes that the survey revealed have real-life implications.⁴⁵ Student protesters at Middlebury College in 2017 resorted to both heckling and violence to suppress the speech of Charles Murray, a controversial scholar whose book, *The Bell Curve*, claims that an individual’s socioeconomic status is likely the product of that individual’s race and cognitive ability.⁴⁶ Rather than listening to Murray speak and then providing arguments against his faulty position, they physically confronted him and caused a college faculty member standing nearby to suffer a head injury.⁴⁷ As Murray and the faculty member attempted to leave, the protesters began rocking and jumping on Murray’s car.⁴⁸ Over 100 students are estimated to have engaged in the suppression efforts, although additional protesters may not have been members of the campus community.⁴⁹ These efforts to shut down the speech of others through violence and shouting, known as “the heckler’s veto,” have occurred frequently on college campuses and raise concerns that students are increasingly believing that “justice is the advantage of those with stronger vocal cords, of those who are more passionate and angry, of those who better intimidate others from speaking.”⁵⁰

42. *Id.*

43. *Id.*

44. *See id.*

45. *See generally* Alina Tugend, *Colleges Grapple with Where—or Whether—to Draw the Line on Free Speech*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/education/learning/colleges-free-speech.html> (discussing how colleges are struggling to balance protecting students from offensive speech while still guaranteeing freedom of speech to others).

46. *See id.*

47. *See id.*

48. Stephanie Saul, *Dozens of Middlebury Students are Disciplined for Charles Murray Protest*, N.Y. TIMES (May 24, 2017), <https://www.nytimes.com/2017/05/24/us/middlebury-college-charles-murray-bell-curve.html?module=inline>.

49. *Id.*; Taylor Gee, *How the Middlebury Riot Really Went Down*, POLITICO (May 28, 2017), <https://www.politico.com/magazine/story/2017/05/28/how-donald-trump-caused-the-middlebury-melee-215195>.

50. Tom Lindsay, *Outlawing the ‘Heckler’s Veto’: Drive to Restore Free Speech on Campus Gathers Steam in the States*, FORBES (Jan. 26, 2018, 3:50 PM), <https://www.forbes.com/sites/tomlindsay/2018/01/26/outlawing-the-hecklers-veto-drive-to-restore-free-speech-on-campus-gathers-steam-in-the-states/#6b49007adb06>.

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The heckler's veto, however, is only one of many current obstacles to the free exchange of ideas on college campuses.⁵¹ Since the 2016 elections and the accompanying polarization of the United States, college campuses have faced various accusations of speech suppression as administrators attempt to maintain order during the political turbulence.⁵² One such charge involves the imposition of "free speech zones."⁵³ Campus officials informed one student at Pierce College, for instance, that he could not distribute copies of the United States Constitution that had been translated into Spanish unless he sought a permit and stood within a designated area for such "activities."⁵⁴ The designated free speech zone, which approximately matched the square footage "of three parking spaces," consisted of an area where students could freely speak and express themselves in accordance with the First Amendment.⁵⁵ Disturbed by the obvious irony of having his speech restricted as he attempted to educate his peers about the protections afforded by the Constitution, the Pierce College student filed suit in federal court.⁵⁶ The school eventually settled with the aggrieved student, agreeing to abolish its policy of limiting free speech to designated areas and to pay his attorney's fees.⁵⁷ Nonetheless, this example demonstrates the underlying tension on college campuses among students and administrators regarding the free exercise of speech.⁵⁸

D. Attempts to Improve the Free-Flow of Ideas on College Campuses

The issue of speech restriction on college campuses, as multifaceted and complex as it is, has not gone unnoticed or unaddressed.⁵⁹ In 2015, the University of Chicago revolted against the increased desire among students and administrators to restrict speech by issuing a declaration

51. See Tabitha Whissemore, *A Look at Free Speech on Campus*, 88 COMMUNITY C. J. 10, 10 (2018) (discussing the various impediments to the free exchange of ideas on college campuses following the 2016 elections).

52. *See id.*

53. *Id.*

54. *Id.*

55. See Perry Chiamonte, *LA College District Abolishes Free Speech Zones as Part of Lawsuit Settlement*, FOX NEWS (Dec. 14, 2018), <https://www.foxnews.com/us/la-college-district-abolishes-free-speech-zones-as-part-of-lawsuit-settlement>.

56. *See id.*

57. *Id.*

58. *See id.*

59. See Jeremy W. Peters, *In Name of Free Speech, States Crack Down on Campus Protests*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html>.

known famously as “The Chicago Statement.”⁶⁰ This statement underscored the school’s commitment to remaining a forum where incompatible ideas could freely conflict.⁶¹ While acknowledging that such a conflict may make students uncomfortable, the Statement declared that “it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive.”⁶² This commitment to fostering debate fits with the idea that a collision of ideas naturally produces truth, and is reflected in the Statement where the university promises to provide its students and faculty “the broadest possible latitude to speak, write, listen, challenge, and *learn*.”⁶³ As such, The Chicago Statement ensures that the university continues to function as the traditionally-indispensable institution for the maintenance of progressive and democratic societies.⁶⁴

This declared commitment to improving the free-flow of ideas on campus, viewed by many as a call to restoring the university to its proper role as a forum for fostering discourse on pressing topics, inspired several other public and private schools to issue similar statements.⁶⁵ Currently, over thirty schools—including Princeton, Georgetown, and Michigan State—have issued at least some declaration modeled after The Chicago Statement affirming their commitment to prioritizing free speech on campus.⁶⁶ This number, however, encompasses only a fraction of the colleges in the United States.⁶⁷ Consequently, proponents of the values enumerated in The Chicago Statement have sought innovative ways to further proliferate their adoption, such as by having state legislatures compel their public colleges to commit themselves to the promises contained within the Statement, and by having Congress condition the receipt of Title IV funding on the adoption of the Statement.⁶⁸ Regardless of the manner in which colleges affirm their commitment to free speech, the fact that the University of Chicago drafted such a document demonstrates that

60. See Tom Lindsay, *35 Universities Adopt ‘The Chicago Statement’ on Free Speech—1,606 to go*, FORBES (Feb. 28, 2018, 11:08 AM), <https://www.forbes.com/sites/tomlindsay/2018/02/28/35-universities-adopt-the-chicago-statement-on-free-speech-1590-to-go/#52b40d31771b>.

61. See COMM. ON FREEDOM OF EXPRESSION, UNIV. OF CHI., REPORT OF THE COMMITTEE ON THE FREEDOM OF EXPRESSION (2015), <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

62. *Id.*

63. *Id.* (emphasis added).

64. See *id.*

65. See Lindsay, *supra* note 60.

66. *Id.*

67. See *id.*

68. See *id.*

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the traditional understanding of the importance of free and unobstructed dialogue on campus, as viewed by the student activists of the Berkley Free Speech Movement during the mid-1960s, continues to inspire many within academia.⁶⁹

State legislatures also have acted to improve the free flow of ideas at their public colleges by adopting the Goldwater Institute's Model Bill for improving free speech on college campuses.⁷⁰ However, unlike The Chicago Statement, the Model Bill contains troubling components that ironically increase the threats to free speech.⁷¹ Nonetheless, over a dozen states are considering enacting some form of legislation modeled after the Goldwater Institute's proposal.⁷²

The Goldwater Institute's Model Bill applies only to public colleges and contains various provisions that reaffirm the post-1960s understanding of free speech on college campuses.⁷³ The Model Bill seeks to prevent students from using the heckler's veto to suppress speech they dislike and expands the areas where students may freely speak and express themselves.⁷⁴ The first few provisions of the Model Bill require the Board of Trustees "of all state institutions of higher education" to acknowledge and adopt some of the aspirational values contained within The Chicago Statement.⁷⁵ The non-exhaustive list of free speech principles that the Model Bill requires public schools to adopt involve the importance of debate in discovering truth and advancing knowledge and the idea that administrators lack any obligation to shield students from "disagreeable" or "deeply offensive" speech.⁷⁶

The Model Bill then effectively abolishes the existence of free speech zones by stating that all "public areas of campuses of the

69. *See id.*; CHEMERINSKY & GILLMAN, *supra* note 11, at 75.

70. *See* Lindsay, *supra* note 60 (noting that the North Carolina legislature adopted the Goldwater Institute's Model Bill).

71. *See* Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 125–26 (2018) (For example, provisions seeking to mandate that institutions punish students who disrupt the speech of others could result in students refraining from speech based on fear of punishment.).

72. Jennifer Tiedemann, *Nebraska Becomes Latest State to Consider Campus Free Speech Bill Based on Goldwater Institute Model*, GOLDWATER INST. (Jan. 15, 2018), <https://goldwaterinstitute.org/article/nebraska-becomes-latest-state-to-consider-campus-free-speech-bill-based-on-goldwater-institute-model/>.

73. *See* GOLDWATER INST., CAMPUS FREE SPEECH ACT (2017), https://goldwaterinstitute.org/wp-content/uploads/2019/04/Campus-Free-Speech_Model-Legislation_Web.pdf [hereinafter CAMPUS FREE SPEECH ACT].

74. *See id.*

75. *See id.*

76. *See id.*

institution are traditional public forums, open on the same terms to any speaker.”⁷⁷ This provision likely seeks to prevent public colleges from limiting free speech to designated areas that match the size of a few parking spaces and prohibiting students from fulfilling their First Amendment rights anywhere outside such zones.⁷⁸ Such policies risk turning any campus into a tame and carefully controlled atmosphere where discourse is controlled and debate stifled—the same kind of apparatus the student activists of the 1960s fought to dismantle.⁷⁹ Consequently, these initial provisions of the Model Bill that provide aspirational guidance and eliminate the practice of forcing students who wish to speak freely to stand within designated areas target forms of speech suppression and likely will improve the free-flow of ideas on campuses.⁸⁰

The clauses following these first few provisions of the model bill, however, outline a disciplinary scheme that risks producing the undesirable and counterproductive result of chilling free speech.⁸¹ Section 1(H) broadly states that there shall be “disciplinary sanctions for anyone under the jurisdiction of the institution who materially and substantially interferes with the free expression of others.”⁸² Moreover, the Model Bill requires the school to suspend or expel any student who is found to have interfered with the “expressive rights of others” on at least two occasions.⁸³ This language likely seeks to target the infamous “heckler’s veto,” which arises when mobs resort to shouting or violence to prevent speakers with whom they disagree from engaging in debate.⁸⁴ While the heckler’s veto is a traditional tool of speech suppression, in that it prevents people from speaking or listening,⁸⁵ the disciplinary scheme’s broad language risks interfering with the free speech of students who wish to peacefully protest offensive speakers.⁸⁶ The fear of facing sanctions for strongly voicing opposition to a guest speaker may chill speech that is equally as valuable as the speech the sanctions in the Model Bill seek to protect.⁸⁷ This irony of the Model Bill led the American Civil Liberties Union to object to its discipline requirements when North

77. CAMPUS FREE SPEECH ACT, *supra* note 73.

78. *See, e.g.*, Chiaramonte, *supra* note 55.

79. *See supra* Section I.B.

80. *See* Hutchens & Fernandez, *supra* note 71, at 125.

81. *Id.*

82. CAMPUS FREE SPEECH ACT, *supra* note 73.

83. *Id.*

84. *See* Lindsay, *supra* note 50.

85. *Id.*

86. *See* Hutchens & Fernandez, *supra* note 71, at 126.

87. *See id.*

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Carolina sought to enact the bill into law.⁸⁸ This situation provides a reminder of the complexity of the free speech issues facing institutions of higher education and the difficult task of encouraging free speech without stifling other forms of expression.

E. An Overlooked Violation of Free Speech on Campus? Mandatory Student Activity Fees and the State Subsidization of Speech

Another, but perhaps less-well known, area of dispute regarding speech on campus involves the practice among public colleges of charging students mandatory activity fees which they use to fund student organizations with various ideological and political leanings.⁸⁹ While the existence of free speech zones, the pervasive use of the heckler's veto, and the perceived failure of college administrators to remain committed to hosting a forum for open dialogue garner plenty of attention regarding free speech issues on campus, the issue of state subsidization of speech through the allocation of mandatory activity fees has remained on the sidelines since the early 2000s.⁹⁰ Following the Supreme Court's recent decision in *Janus v. AFSCME*, however, free speech advocates have revisited this issue with renewed interest.⁹¹

Colleges regularly engage in the practice of charging their students mandatory student activity fees, which originally funded uncontroversial expenses such as commencement attire and admission to on-campus events.⁹² During the latter-half of the twentieth century, however, colleges began using these mandatory fees to fund student organizations that engage in activities on campus reflecting special interest lobbying.⁹³ One important component of the protections afforded by the First Amendment, however, is the guarantee that the state cannot compel any individual to "subsidize the speech of others."⁹⁴ Consequently, the free speech concern regarding the use of mandatory activity fees applies only to state schools.⁹⁵ Once colleges began funding student organizations with the revenue generated from activity fees, students who disagreed with the political views of the organizations they were involuntarily funding

88. *See id.*

89. *See Lucas, supra* note 1.

90. *See id.*

91. *See id.*; Baude & Volokh, *supra* note 5, at 199–200.

92. *See* JORDAN LORENCE, FIRE'S GUIDE TO STUDENT FEES, FUNDING, AND LEGAL EQUALITY ON CAMPUS 3 (2003).

93. *See id.* at 3–4.

94. *See* Roy Whitehead, Jr. & Walter Block, *Mandatory Student Fees: Forcing Some to Pay for the Free Speech of Others*, 20 WHITTIER L. REV. 759, 764 (1999).

95. *See id.*

resorted to litigation, which resulted in a Supreme Court decision unfavorable to the aggrieved students.⁹⁶ The following sections discuss the Supreme Court's jurisprudence surrounding various forms of state subsidization of speech and how the Court's recent decision in *Janus* may signal an opportunity to challenge the precedent of earlier cases, with an explanation as to why free speech advocates should refrain from taking such an opportunity and why courts should reject any such attempts.

II. THE SUPREME COURT'S JURISPRUDENCE SURROUNDING THE STATE-SUBSIDIZATION OF SPEECH

The Supreme Court has resolved many First Amendment disputes regarding the state subsidization of speech in various contexts.⁹⁷ Any discussion of state subsidization of speech, however, must begin with *Abood v. Detroit Board of Education*, the case in which the Supreme Court established the general rule governing how public entities use mandatory fees to fund speech, and which the Supreme Court recently overturned in *Janus v. AFSCME*.⁹⁸ *Abood* fell within the line of cases involving the use of union fees to subsidize political speech, and the following subsections analyze how the Supreme Court extended *Abood* to apply to state bar fees but avoided extending it to mandatory student activity fees.

A. *Abood v. Detroit Board of Education*

In its 1977 decision in *Abood*, the Supreme Court addressed whether a public union could compel nonunion government workers—teachers in this case—to pay a service fee without violating their First and Fourteenth Amendment rights.⁹⁹ The service fee requirement at issue stemmed from an “agency shop clause” contained within a collective-bargaining agreement between the public union and the local government employer, the Detroit Board of Education, which required the Board to discharge any nonmember employee who refused to pay the union its fee.¹⁰⁰ Such a

96. See generally *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000).

97. See generally *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (examining the constitutionality of state subsidized speech in the context of public union agency fees); see also *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (examining the constitutionality of state subsidized speech in the context of state bar fees).

98. See 431 U.S. at 235–36; *Janus v. AFSCME*, 138 S. Ct. 2448, 2460 (2018).

99. See *Abood*, 431 U.S. at 211–13.

100. *Id.* at 212.

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clause prevents employees from unfairly enjoying the benefits secured by the union's representation without paying for union membership.¹⁰¹

The nonmember teachers argued that the mandatory service fee arrangement violated the First Amendment because the union used the revenue generated from it to fund political, social, and ideological activities with which they disagreed and which they could not challenge due to their status as nonmembers.¹⁰² As such, the teachers sued both the union and Board.¹⁰³ To address the teachers' First Amendment concerns, the Supreme Court drew a distinction between two categories of activities that the union funded through the mandatory service fee.¹⁰⁴ The first category consisted of activities central to the function of the union, and which the Supreme Court held did not present a First Amendment violation.¹⁰⁵ Consequently, the union could use mandatory service fees to "finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment," since these activities fell within the central role of the union.¹⁰⁶

The Court held that the second category of activities that the union funded through the service fees, however, violated the teachers' First Amendment rights.¹⁰⁷ This second category encompassed political activities and social causes nonessential to the primary function of the union as the bargaining representative of the workers.¹⁰⁸ If the union wished to "spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes *not germane* to its duties as collective-bargaining representative," it must first receive the permission of the workers to avoid a First Amendment violation and could not threaten the loss of employment for refusing to pay the fee.¹⁰⁹

The Supreme Court arrived at this conclusion by relying on the general, well-accepted principle that the First Amendment protects an individual's freedom to contribute to political causes.¹¹⁰ Just as the First

101. *See id.* at 221–22 (first citing *Int'l Ass'n of Machinists v. St.*, 367 U.S. 740, 761 (1961); then citing *Oil, Chem. & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415–16 (1976); and then citing *NLRB v. Gen. Motors Corp.*, 373 U.S. 734, 740–41 (1963)).

102. *See id.* at 212–13.

103. *Id.* at 212.

104. *Abood*, 431 U.S. at 225–26, 234.

105. *See id.* at 225–27.

106. *Id.* at 225–26.

107. *See id.* at 237.

108. *See id.* at 234.

109. *See Abood*, 431 U.S. at 235–36 (emphasis added).

110. *Id.* at 234.

Amendment prohibits the state from infringing on an individual's ability to financially back a political organization, the First Amendment also prohibits the state from compelling an individual to support a particular cause.¹¹¹ The distinction between the state-imposed prohibition and state-imposed compulsion of speech "works no less an infringement of [a person's] constitutional rights."¹¹² Consequently, the union could not threaten government workers with loss of employment for refusing to pay a fee it used to fund political activities nonessential to its function as a sole representative of public workers.¹¹³

B. State Bar Fees

The Supreme Court extended the rule in *Abood* to govern the use of mandatory state bar association fees.¹¹⁴ In *Keller v. State Bar of California*, the Court addressed the arguments made by attorneys admitted to practice law in California that the state bar violated their First and Fourteenth Amendment rights by using its mandatory fees to fund political activities with which they disagreed.¹¹⁵ The California State Bar falls under the category of an "integrated bar," meaning that attorneys who wish to practice law in California must first join the bar and pay its membership fees.¹¹⁶ Consequently, the payment of these membership fees consisted of a condition for employment of attorneys just as the service fee in *Abood* did for the teachers.¹¹⁷

Prior to the case reaching the Supreme Court, California's highest court ruled in favor of the state bar association on the grounds that it consisted of a "state regulated agency," which "exempted it from any constitutional constraints on the use of its dues."¹¹⁸ The principle underlying this conclusion, known as the "government speech doctrine," holds that government agencies must possess the ability to take positions on pressing public concerns to effectively fulfill their governing functions.¹¹⁹ The idea behind this doctrine is that:

[i]f every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private

111. *See id.*

112. *Id.*

113. *See id.* at 235–36.

114. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 4 (1990).

115. *Id.* at 5–6.

116. *Id.* at 4–5.

117. *See id.*; *Abood*, 431 U.S. at 211.

118. *Keller*, 496 U.S. at 10.

119. *See id.*

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sector, and the process of government as we know it would be radically transformed.¹²⁰

Under this rationale, the California State Bar could freely use the mandatory fees to support causes in the same manner that other government agencies use tax revenue to fund activities with which certain citizens find objectionable.¹²¹

The Supreme Court, however, disagreed with this conclusion.¹²² Focusing on the functions and characteristics of the California State Bar, the Court held that the bar differed significantly from typical government agencies.¹²³ First, the funds for the bar association do not originate from the legislature's purse and the average tax payer, but rather from the fees imposed on its attorney members.¹²⁴ Second, it does not enjoy any regulatory authority but rather fulfills an advisory role on behalf of the legal profession.¹²⁵ For instance, decisions such as who should practice law in California, which attorneys deserve to be disbarred, and which rules of professional conduct the state should adopt all rest with the California Supreme Court.¹²⁶ Unlike a government agency, the California State Bar merely plays an advisory role regarding all these decisions.¹²⁷ Given these facts, the Court held that the "government speech doctrine" does not apply to the California State Bar like it does for a "governor, mayor, or a State Tax commission."¹²⁸

After determining that the California State Bar did not enjoy the protections typically held by government agencies to freely adopt positions funded through its revenue, it concluded that enough similarities existed between unions and their employees, and state bar associations and attorneys, to justify an extension of *Abood*.¹²⁹ Both workers and attorneys receive substantial benefits from the advocacy and representation of labor unions and state bar associations, respectively.¹³⁰ As such, both labor unions and state bar associations justifiably may charge mandatory fees to

120. *Id.* at 12–13.

121. *See id.* at 10.

122. *See id.* at 11.

123. *Keller*, 496 U.S. at 11.

124. *See id.*

125. *See id.*

126. *See id.* (citing CAL. BUS. & PROF. CODE §§ 6064, 6067, 6100 (Deering, LEXIS through 2020 Sess.)).

127. *See id.*

128. *See Keller*, 496 U.S. at 11–13.

129. *See id.* at 12–13.

130. *See id.* at 12.

those who fall under their protection, regardless of whether those individuals wish to obtain membership in those organizations.¹³¹

Under these circumstances, the Court held that the rule established in *Abood* governed the use of mandatory fees charged by the California State Bar.¹³² As such, the same distinction the Supreme Court identified in *Abood* between the types of activities that unions may and may not fund applied.¹³³ In other words, the First Amendment permits the state bar to “fund activities germane to those goals out of the mandatory dues of all members. [The bar] may not . . . fund activities of an ideological nature which fall outside of those areas of activity.”¹³⁴ The Supreme Court’s willingness to apply the rule in *Abood* to new contexts outside of the union-worker relationship demonstrates that it considered the rule in *Abood* as the governing principle for cases involving the state subsidization of speech, generally.¹³⁵ An examination of the case law surrounding mandatory student activity fees, however, undermines such a proposition.¹³⁶

C. Student Activity Fees

Unlike state bar membership fees, the Supreme Court refused to apply the rule established in *Abood* to mandatory activity fees charged by public colleges.¹³⁷ In *Board of Regents of University of Wisconsin System v. Southworth*, students of the University of Wisconsin sued the school’s board of regents under the First Amendment, alleging that it engaged in a policy that required them to sponsor speech with which the students disagreed.¹³⁸ The university charged all full-time students a “nonrefundable activity fee” that it used to fund “various campus services and extra-curricular student activities.”¹³⁹ The student organizations that received funding from the mandatory activity fees included the International Socialist Organization, the College Republicans, as well as the American Civil Liberties Union Campus Chapter—a diverse range of groups with

131. *See id.*

132. *See id.* at 13–14.

133. *Keller*, 496 U.S. at 14.

134. *Id.* at 14.

135. *See id.* at 13.

136. *See generally* Bd. of Regents v. Southworth, 529 U.S. 217 (2000) (holding that the rule established in *Abood* should not govern mandatory activity fees charged by public colleges).

137. *See id.* at 230.

138. *See id.* at 221.

139. *Id.* at 222.

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conflicting political and ideological leanings.¹⁴⁰ Naturally, the university's policy would require students to fund organizations whose beliefs differed significantly from their own.¹⁴¹ Consequently, the students who filed the lawsuit argued that the school needed to provide them with the option to opt out of funding certain groups.¹⁴² Otherwise, the public university would be compelling them to fund speech in violation of the First Amendment.¹⁴³

The federal district court, relying on the precedent established by *Abood* and *Keller*, granted summary judgment in favor of the student-plaintiffs.¹⁴⁴ It held that charging mandatory activity fees amounted to a violation of the students' freedom of speech and association.¹⁴⁵ The Court of Appeals for the Seventh Circuit agreed with the decision of the district court after similarly applying *Abood*.¹⁴⁶ It determined that the fees funded activities not germane to its function as a school and therefore ran counter to the requirements of the First Amendment.¹⁴⁷

The Supreme Court, however, completely rejected the idea of applying the rule established by *Abood* and *Keller* to govern mandatory student activity fees.¹⁴⁸ The Court acknowledged that the conclusions reached by the lower courts naturally flow from its earlier decisions in those two cases, and that the facts of *Southworth* correctly implicate their precedent.¹⁴⁹ The Court went on to hold, however, that the "germane speech" rule of *Abood* and *Keller* provides an unworkable legal framework to govern activity fees.¹⁵⁰ The line separating speech that is germane to the function of any public entity from speech that is not, the Court reasoned, is difficult to ascertain.¹⁵¹ Since it already is challenging "to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas."¹⁵² Consequently, the Court

140. *Id.* at 223.

141. *See Southworth*, 529 U.S. at 223.

142. *Id.* at 227.

143. *See id.*

144. *Id.*

145. *Id.*

146. *See Southworth*, 529 U.S. at 227.

147. *Id.*

148. *See id.* at 230.

149. *Id.* at 231.

150. *See id.*

151. *See Southworth*, 529 U.S. at 231–32.

152. *Id.* at 232.

concluded that the rule first established by *Abood* and later extended by *Keller* provided an unworkable legal standard for mandatory activity fees.¹⁵³

Since the Court found practical difficulty with the germane speech rule of *Abood*, it chose to adopt the “viewpoint neutrality” standard typically associated with public forum law.¹⁵⁴ Under this standard, public universities may continue charging students mandatory activity fees to fund a diverse range of student organizations.¹⁵⁵ Once they do, however, they cannot “prefer some viewpoints to others.”¹⁵⁶ Such a standard, the Court held, provided a more workable legal framework for public colleges given their unique role in American society.¹⁵⁷ For instance, the viewpoint neutrality rule ensures that students “have the *means* to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular life outside the lecture hall.”¹⁵⁸ In other words, despite requiring students to subsidize forms of expression they might find distasteful, the policy of using mandatory student activity fees to fund diverse student organizations ensures that colleges remain a vibrant forum where diverging viewpoints may thrive and clash in debate.¹⁵⁹ Under the viewpoint neutrality rule, the campus environment envisioned by the student activists of the 1960s endures.

D. Janus v. AFSCME

In the summer of 2018, the Supreme Court garnered attention by overturning *Abood* in *Janus v. AFSCME*.¹⁶⁰ After stating that “*Abood* was poorly reasoned” and that the decision “led to practical problems and abuse,” the Court held that any collective-bargaining agreement between a union and a government employer that required nonunion workers to pay union fees against their consent violated the First Amendment, regardless of whether the funds served the germane functions of the union.¹⁶¹ The decision received mixed public reaction, with the *New York Times* labeling it a “major blow” to unionized workers, and President

153. *See id.*

154. *Id.* at 230.

155. *Id.* at 233–34.

156. *Southworth*, 529 U.S. at 233.

157. *See id.* at 234.

158. *Id.* at 233 (emphasis added).

159. *See id.*

160. *See e.g.*, Adam Liptak, *Supreme Court Ruling Delivers a Sharp Blow to Labor Unions*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/27/us/politics/supreme-court-unions-organized-labor.html>.

161. *See Janus v. AFSCME*, 138 S. Ct. 2448, 2460, 2486 (2018).

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Trump heralding it as a proper stopgap on the alleged flow of funds from unions to Democratic politicians.¹⁶² Further, Justice Sotomayor characterized it in her dissenting opinion as an example of the Court “weaponizing the First Amendment.”¹⁶³

Similar to *Abood*, the dispute in *Janus* involved a state law that authorized government workers to select a union to serve as their sole representative for purposes of negotiating with their government employer.¹⁶⁴ The union would then represent all workers regardless of whether they joined it.¹⁶⁵ Consequently, the union would charge non-members an agency fee to compensate the union for the benefits its representation conferred them.¹⁶⁶ In accordance with *Abood*, these agency fees could only fund activities germane to the function of the union, and not for purposes such as political campaigning.¹⁶⁷ An employee of the Illinois Department of Healthcare and Family Services claimed that he strongly disagreed with his union’s collective bargaining positions and representation, and that its imposition of an agency fee to fund these positions violated his First Amendment rights.¹⁶⁸ Relying on the Supreme Court’s decision in *Abood*, the federal district court dismissed the worker’s claim and the Seventh Circuit Court of Appeals affirmed.¹⁶⁹

The Supreme Court, however, determined that it was time to overrule *Abood*.¹⁷⁰ To justify the drastic step of overturning its own precedent, the Court highlighted *Abood*’s incompatibility with the underlying principles of the First Amendment as well as its failure to acknowledge the difficulty of implementing the germane activities test.¹⁷¹ First, the Court articulated the importance of the Constitution’s prohibition against state-compelled speech.¹⁷² Since the freedom of expression is a necessary element for both the maintenance of democracy and a truth-seeking society, compelled speech “undermines these ends” and results in individuals “betraying their convictions.”¹⁷³ Further, it pointed to the impracticality of

162. Liptak, *supra* note 160.

163. *Janus*, 138 S. Ct. at 2501 (Sotomayor, J., dissenting).

164. *See id.* at 2460 (first citing 5 ILL. COMP. STAT. 315/6(a) (2019); then citing § 3(s)(1); then citing § 6(c); and then citing § 9).

165. *See id.* (citing § 6(a), (c)).

166. *See id.*

167. *See id.* at 2460–61 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977)).

168. *See Janus*, 138 S. Ct. at 2461.

169. *Id.* at 2462 (citing *Janus v. AFSCME*, 851 F.3d 746, 749 (7th Cir. 2017)).

170. *Id.* at 2460.

171. *See id.* at 2463–64, 2480 (quoting *Harris v. Quinn*, 573 U.S. 616, 636 (2014)).

172. *See id.* at 2463–64.

173. *Janus*, 138 S. Ct. at 2464.

the germane functions test the Court adopted in *Abood*.¹⁷⁴ This test suffers from the “difficulty of distinguishing . . . between union expenditures that are made for collective-bargaining purposes and those that are made to achieve political ends.”¹⁷⁵ Given these considerations, the Court declared that *Abood* no longer governed this area of law and that the First Amendment requires unions to obtain the consent of nonmember employees prior to charging them fees.¹⁷⁶

III. THE IMPLICATIONS OF *JANUS* FOR MANDATORY STUDENT ACTIVITY FEES

Shortly after the Supreme Court issued its decision in *Janus*, commentators began speculating whether it signaled an opportunity for free speech advocates to reinitiate their constitutional attack on mandatory student activity fees.¹⁷⁷ This possibility seems plausible given the Court’s sweeping refutation of state-compelled speech, which revealed its newfound commitment to defending a highly robust First Amendment.¹⁷⁸ Staging such a legal battle, however, would consist of a waste of legal resources and energy and courts should reject any such attempt at extending *Janus*. The Supreme Court adopted a legal framework highly protective of First Amendment rights to govern student activity fees, which differs significantly from the *Abood* framework the Court deemed inadequate in *Janus*, and which likely increases, rather than stifles, the free flow of ideas on campus.¹⁷⁹ As such, courts should allow the current governing framework to remain in place and free speech advocates should focus their legal resources elsewhere to combat speech suppression on campuses.

The shortcomings of the *Abood* framework the Supreme Court identified in *Janus* do not apply to the legal test the Court imposed on

174. See *id.* at 2480 (quoting *Harris*, 573 U.S. at 637).

175. *Id.* (quoting *Harris*, 573 U.S. at 636).

176. See *id.* at 2486.

177. See, e.g., Lucas, *supra* note 1; Baude & Volokh, *supra* note 5, at 198–99.

178. See Baude & Volokh, *supra* note 5, at 199 (explaining that the Court’s justifications in *Southworth* for upholding the practice among public colleges to charge activity fees “do not fit well with the *Janus* majority,” and that it is entirely possible that the Court may overrule *Southworth*); but see Erwin Chemerinsky & Catherine L. Fisk, *Response: Exaggerating the Effects of Janus: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 56 (2018) (arguing that *Janus* poses no risk to the constitutionality of mandatory activity fees). While disagreement obviously exists over whether *Janus* truly calls the constitutionality of mandatory activity fees into question, this Note adds to the discussion by addressing the undesirable consequences that would result should courts extend *Janus* to this context.

179. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 230 (2000); *Janus*, 138 S. Ct. at 2486 (quoting *Janus*, 138 S. Ct. at 2487 (Kagan, J., dissenting)).

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mandatory activity fees. As discussed above, the Supreme Court determined that the unique characteristics of college campuses warranted against extending the germane functions test of *Abood* to mandatory activity fees.¹⁸⁰ Rather, the Court imposed an entirely separate legal test—the viewpoint neutrality standard—to govern fees charged within the academic context.¹⁸¹ This test is far superior to the *Abood* analysis in several aspects, making it an acceptable legal framework for serving the First Amendment’s goal of fostering debate and paving the path to truth.

The first, and most obvious, reason why the viewpoint neutrality standard provides a more workable framework as compared to *Abood*’s germane activity test is the ease with which the courts may apply it to the disputes that come before them. In *Janus*, the Court highlighted the impracticality of the germane activities test to support its decision to overrule *Abood*.¹⁸² As mentioned earlier, the difficulty in determining where to make the divide between activities germane to the function of the union and activities that are primarily political led the Court to declare that “*Abood* was not well reasoned.”¹⁸³

This problem does not arise under the viewpoint neutrality standard. Under this test, lower courts need not draw arbitrary lines between arguably similar activities or make categorical distinctions.¹⁸⁴ Rather, courts must only ensure that public colleges allocate funds equally to student organizations irrespective of their viewpoints—an objectively clearer and less-arbitrary determination.¹⁸⁵ In fact, the Court of Appeals for the Seventh Circuit clarified the viewpoint neutrality standard even further by interjecting an “unbridled discretion” requirement.¹⁸⁶ With their case remanded from the Supreme Court, following its decision in *Southworth*, the disgruntled students at the University of Wisconsin argued that the school failed to abide by the Court’s newly-imposed viewpoint neutrality standard because the student government possessed broad authority in granting student organizations funds.¹⁸⁷ This “unbridled discretion” to

180. See *Southworth*, 529 U.S. at 231.

181. *Id.* at 230.

182. *Janus*, 138 S. Ct. at 2480 (quoting *Harris v. Quinn*, 573 U.S. 616, 637 (2014)).

183. *Id.* at 2480–81. See also *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977) (“There will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited.”).

184. See *Southworth*, 529 U.S. at 233.

185. See *id.*

186. See *Southworth v. Bd. of Regents*, 307 F.3d 566, 578 (2002).

187. *Id.* at 568.

deny certain organizations funds generated by the mandatory activity fees, the students alleged, ran counter to the viewpoint neutrality test.¹⁸⁸

The Seventh Circuit agreed with the students about the existence of that requirement, holding that, “[w]hile the Supreme Court has never expressly held that the prohibition on unbridled discretion is an element of viewpoint neutrality, we believe that conclusion inevitably flows from the Court’s unbridled discretion cases.”¹⁸⁹ Consequently, the viewpoint neutrality framework—as enhanced by the Seventh Circuit—requires public colleges to implement clear standards on the method of fund distribution to ensure that the “decisionmaker” in charge of allocating fees to student organizations does not have “unduly broad discretion to favor or disfavor speech based on its viewpoint or content.”¹⁹⁰ Aside from clarifying the requirements of viewpoint neutrality, this decision—by mandating that public schools enact specific guidelines outlining the method of fund distribution—provides an additional protection to free speech that the *Abood* framework lacked.¹⁹¹

Another reason courts should refuse to extend *Janus* to mandatory activity fees and free speech advocates should refrain from pursuing a legal battle against them is the fact that the viewpoint neutrality framework the Supreme Court adopted in *Southworth* likely encourages the free flow of ideas more than it stifles thoughtful debate. As discussed earlier, college campuses play a unique role in American society by acting as forums where individuals can freely challenge each other’s beliefs and assumptions in the search for progress and truth.¹⁹² If the Supreme Court eliminated the ability of public colleges to charge mandatory activity fees to fund diverse student organizations, those organizations supporting relatively unpopular beliefs on campus likely will be drowned out among the more mainstream and established groups. The Supreme Court acknowledged this possibility in *Southworth* when it imposed the viewpoint neutrality framework, stating that “[t]he University may determine that its mission is well served if students have the means to engage in dynamic discussions”¹⁹³ Compelling students to subsidize diverse student organizations—including those representing causes students may view unfavorably—ensures that students have access to a diverse range

188. *Id.* at 574.

189. *Id.* at 578.

190. *See id.* at 579.

191. *See Southworth*, 307 F.3d at 579.

192. *See supra* Section I.B.

193. *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000).

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of viewpoints, thereby serving the traditional mission of colleges to seek truth through the collision of incompatible beliefs.

CONCLUSION

The Supreme Court’s decision in *Janus* demonstrated its willingness to overturn long-established precedent in the name of providing robust First Amendment protections. While free speech advocates concerned about the quality of debate on college campuses might feel tempted to rely on the momentum of *Janus* to attack the constitutionality of the practice among college campuses to charge mandatory activity fees to subsidize student organizations, such an endeavor would produce the undesirable result of reducing the range of viewpoints on campus. Arguably, campus reformers would better serve the principles underlying free speech by using their legal resources to extend the Seventh Circuit’s “unbridled discretion” requirement to other jurisdictions rather than abolish mandatory activity fees. Future legal research should examine other First Amendment issues relating to college campuses, such as the questionable constitutionality of free speech zones and measures implemented by state legislatures—such as the Goldwater Institute’s Model Bill—that aim to eliminate the heckler’s veto. Regardless of the future path of legal research and First Amendment litigation, however, those who value colleges as a forum for debate must resist the temptation to eliminate mandatory activity fees.